STATE OF CALIFORNIA EDMUND G. BROWN, JR., GOVERNOR

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The Honorable City Council
City of Los Angeles
Room 395, City Hall
200 North spring Street
Los Angeles, CA 90012

Re: Position of the California Division of Occupational Safety and Health Concerning Possible Conditions on the City's Film Permits Issued to Adult Film Producers

Honorable Members:

The City of Los Angeles is considering film permit conditions that would protect public health and safety. The City Attorney has rendered an opinion that the City does not have the power to adopt such conditions because they are preempted by State occupational safety and health standards. Such an opinion, if accepted, would impact any similar proposals in the State. Because of its potential effects, the Division, as the agency entrusted with enforcing those standards, submits this opinion concerning this issue.

This communication is restricted to the legal position of the California Division of Occupational Safety and Health ("Cal/OSHA" or the "Division," herein) in connection with the legal argument that State law pre-empts occupational health and safety conditions the City might impose on its film permitted process.

CONCLUSION

It is the Division's position that State law does not preempt such action by the City because the City does not seek to enact an occupational health and safety standard but rather a public health standard applicable to any film activity (regardless of employment relationship) within the City boundaries.

ANALYSIS

I. THE PROPOSED ACTION AND APPLICABLE STATE LAW

A. Proposed City Action

We begin with the nature of the proposed action. The City Attorney has stated that the Council asks whether and how the City can "enable the City's film permit process to require workplace safety in the production of all adult films."[1] From other reports, we believe that the specific proposal is a requirement for the use of condoms to protect actors who engage in high-risk acts of a sexual nature for such films.

Although the City Attorney's report does not specify the action that the Council might take, we understand from City sources that the action would be to add a condition to the permit allowing the filming.

This permit is, in essence, an exception to, or variance from, existing zoning ordinances that prohibit filming in the City except on a sound stage. In that respect, the potential City action would be zoning in nature. The permit also acts as permission to use City property. In this respect, the action would be a condition for the use of that property.

In either case, the permit process would be based on the act of filming. Thus, it would affect all non-soundstage film workplaces regardless of the employment status of the individuals doing the work.[2]

The City's remedy for violating any of the conditions would be revocation of the permit. Any filming done without a permit would be a crime. There is no proposal of which we are aware that would allow the City to take action either in place of, or in the same way as Cal/OSHA regulations (Title 8 California Code of Regulations ("CCR")). The proposed action would not implicate the Cal/OSHA Appeals Process.

B. Applicable State Law

The Division has jurisdiction over "places of employment." (Labor Code § 6307) It has no jurisdiction unless an employer-employee relationship exists. Once this relationship exists,

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[1] We rely on the description of the proposal and other material in the City attorney's Report re: Mechanisms Necessary to Enable the City's Film Permit Process to Require Workplace Safety in the Production of All Adult Films, Report No. R11-0120, dated March 22, 2011.

[2] It is our understanding that films produced using one of the sound stages in the City do not require a permit.

the Division has "supervision over every employment and place of employment in this state . . ."

The Labor Code and Title 8 CCR also set forth the means by which the Division is to exercise its authority to assure employee safety. The system for asserting its authority is, generally, by issuing citations that include administrative penalties for violating one or more of the Title's workplace safety standards. (See Labor Code § 6317) These penalties are not criminal in nature, nor are they contractual. They are appealable to the California Occupational Safety and Health Appeals Board. (Labor Code § 6319)

The California Occupational Safety and Health Standards Board has adopted a general purpose regulation which applies to adult film production as well as other places of employment. Title 8 CCR § 5193 requires the use of condoms on adult film locations that are within the Division's jurisdiction.

C. Comparison of the Proposed Action and State Law

The proposed City action and state law operate differently and for different purposes. The state law operates in the context of administrative regulations adopted by the Standards Board and appealable to the Appeals Board. The proposed City action operates as a condition on the granting of a permit.

The state law and the proposed action also do not affect all of the same people. Actors or volunteers who are independent contractors would not be within the Division's jurisdiction, for instance. The purpose of the Standards Board's regulation is to protect health of employees in places of employment and the purpose of the City's permit process is to protect public health and safety regardless of employment relationship.

II. THE CITY'S GENERAL AUTHORITY TO ADDRESS PUBLIC SAFETY AND HEALTH

A. The Police Power

The City's police power authority to adopt film conditions is assumed for the purposes of this opinion. The Division notes that the film permitting process has been traditionally a matter of local concern for cities in the State. Chapter 3 of Part 5.7 of Division 3, title 2 of the California Government Code (beginning with § 14999.20) does not impose a uniform permitting process, but establishes a "model" film permitting process that is advisory to localities, not mandatory. Further, we note that the use of City property is uniquely a matter of City concern. (See e.g., *Loska vs. Superior Court* (1986) 188 Cal. App. 3rd 569). Cities regulate places of employment, including film sets, in any number of ways. For example, building permits are issued and fire codes are enforced regardless of employment status even though that enforcement may affect occupational safety and may overlap with Cal OSHA

jurisdiction.

B. Express Limitations in the Applicable State Law

The question is whether regulations enforceable by the Division act to limit this basic power.

The Legislature has expressly answered in the negative. In Labor Code § 6316, it said:

> "Except as limited by Chapter 6 (commencing with Section 140) of Division 1, nothing in this part shall deprive the governing body of any county, city, or public corporation, board, or department, of any power or jurisdiction over or relative to any place of employment."

And in Chapter 6 of Division 1 of the Labor Code the Legislature adopted Section 144. That section describes ways in which localities can assist the Division in enforcing its occupational safety and health regulations (i.e., those regulations that are adopted under Title 8 CCR and expressly made the subject of Division enforcement).

In § 144(e), the Legislature made clear that when not enforcing those regulations, localities have a free hand.

> "(e) Nothing in this section shall affect or limit the authority of any state or local agency as to any matter other than the enforcement of occupational safety and health standards adopted by the board; however, nothing herein shall limit or reduce the authority of local agencies to adopt and enforce higher standards relating to occupational safety and health for their own employees." (Emphasis added.)

It is clear that the only matter that the Legislature has put in the hands solely of the Division is the "enforcement of occupational safety and health standards adopted by the [Standards] [B]oard."

By clear implication, localities may adopt and enforce their own standards as long as that adoption is within the localities' police powers. This is true even if the local standards could be construed as "occupational safety and health standards."

III. The City's Authority to Take the Proposed Action

The conclusion is clear. The Legislature allows local safety action, other than explicit enforcement of the Division's own regulations. It has done so in express and unambiguous terms.

The City is not preempted from taking the proposed action.

Very truly yours,

James D. Clark
Staff Counsel